

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Disposition of Down Payments and)	WT Docket No. 02-276
Pending Applications Won During)	
Auction No. 35 for Spectrum Formerly)	
Licensed to NextWave Personal)	
Communications, Inc., Nextwave Power)	
Partners, Inc., and Urban Comm --)	
North Carolina, Inc.)	

COMMENTS OF LEAP WIRELESS INTERNATIONAL, INC.

Leap Wireless International, Inc., on behalf of itself and its subsidiaries (collectively, "Leap"), hereby submits the following comments in the above-captioned proceeding.¹ As a successful bidder in Auction 35 and in light of the massively changed circumstances since that auction closed, Leap urges the Commission to release Auction 35 applicants from their bid obligations. Specifically, Leap strongly supports the Commission's "Selective Opt-Out" scenario: to allow Auction 35 applicants to apply for and receive dismissal of applications for certain licenses and not others without penalty, and to receive an immediate refund of any down payment amounts relating to those licenses.

I. BACKGROUND

Nearly two years ago, Leap successfully bid what it considered to be a prudent and appropriate amount for 22 PCS licenses in Auction 35. However, much has changed in the intervening years. Billions of dollars and thousands of jobs have been lost in the wireless

¹ See Public Notice, *Commission Seeks Comment on Disposition of Down Payments and Pending Applications*, FCC 02-248 (rel. Sept. 12 2002) (the "Notice").

industry, and as Moodys has downgraded the sector from “stable” to “poor,” sources of new capital have all but disappeared.

Leap in particular has suffered during this period. Facing pressure from its creditors and in order to improve its balance sheet Leap has been forced to restrict its planned expansion, to curtail any and all unnecessary expenses, and to engage in several rounds of personnel layoffs.

Yet against this backdrop of financial distress, Leap has in the Commission’s eyes remained obligated to buy (and within five years to build out) those 22 new licenses for which it bid in a time when access to capital markets was possible and telecommunications stock values were materially higher. The Commission should recognize this profound change in circumstances and should release Leap and other bidders from any bid obligation that remains. The agency should do so for two reasons, both related to the effects of the change in financial circumstances. First, releasing carriers from this obligation will provide a boost to this flagging industry, and help the carriers to provide better service to the public. Second, and equally important, to hold bidders to these aging obligations would undermine the allocative goal of the spectrum auction, and would almost certainly place a number of licenses in the hands of entities that are not best suited to use those licenses.

II. REMOVING BID OBLIGATIONS AND REFUNDING DOWN PAYMENTS WOULD ALLOW CARRIERS TO BEST ALLOCATE THEIR SCARCE CAPITAL RESOURCES

To hold all Auction 35 winners to their bids hurts them in two ways. Most obviously, though it refunded the majority of the Auction 35 down payments, the Commission has continued to hold a substantial amount of money – hundreds of millions of dollars – on

deposit.² In Leap's case the Commission is holding approximately \$10.7 million. While these sums may not seem vast relative to the ultimate amounts bid in Auction 35, they are quite significant. For example, the Leap down payment represents an amount more than twice its current market capitalization of approximately \$5 million. The Commission can and should deliver this money back to the carriers to which it belongs, and should thereby provide an immediate additional source of much-needed cash at this dire time.

Less obvious than the cash that bidders have on deposit, but probably more important, is the obligation they retain to buy and pay for these licenses upon ten days' notice from the Commission. This contingent liability effectively requires the winning bidders to maintain a cash or credit reserve in the amount of their winning bids or risk a material default in their obligations to the U.S. Government. This money could otherwise be spent on new investment, to fund operations, or for any number of other uses, all more productive and beneficial to society than maintaining the required reserve.

The amounts involved in the winning bidders' contingent liabilities are staggering: in essence, the entire balance of all the auction 35 winning bids – over \$16 billion – must be held by the industry in reserve, just in case the FCC ever is able to deliver the NextWave licenses. Simply by releasing bidders from their two-year-old high bids, the Commission could remove this massive contingent liability, and could allow carriers to deploy their limited capital efficiently and beneficially.

² Verizon Wireless, for instance, currently has approximately \$261 million on deposit with the Commission.

III. REMOVING THE OBLIGATION TO ACQUIRE UNDESIRE LICENSES WOULD FURTHER THE COMMISSION'S ALLOCATIVE GOALS

The Commission has long stressed that an auction must constitute “a market-based system of spectrum allocation that awards licenses to the applicant best able to use the spectrum effectively and efficiently in the public interest.”³ This is because, in the Commission’s judgment, “an entity’s willingness to pay the most for the license demonstrates its ability to use the spectrum most effectively and efficiently,” as among competing applicants.⁴ In other words, the auction results represent a predictive judgment by the market as to which among several applicants will be the highest and best user of a license. Yet it is far from clear that today, nearly two years after the close of Auction 35, that predictive judgment remains valid.

Indeed, it seems likely that many of the winning bidders in Auction 35 would no longer be the high bidders if the auction were held today. No one at the time of Auction 35 could foresee the confluence of events that have occurred: the court decisions that allowed the result to drag out this long, and far more importantly, the basic changes in the capital markets and the market for wireless telecommunications that have occurred in the interim. Given these profound and unexpected changes in circumstances, the various auction participants’ bidding calculus would almost certainly be different today. And the original high bidders might not turn out to be the highest-value users today. Thus, while the winning bidders from two years ago might reluctantly take the licenses if forced to do so, that would likely result in a misallocation of licenses: the spectrum would not go to the entities who currently value it most highly, but instead it would go to the entities that valued it highly at a different time, under different circumstances.

³ Brief for the Federal Communications Commission in *FCC v. NextWave*, Nos. 01-653 and 01-657 (filed May, 2002) at 19.

⁴ *Id* at 15.

IV. SELECTIVE OPT-IN AND RAPID REFUNDS WILL BEST FURTHER THE COMMISSION'S GOALS

It seems likely that among the various winning bidders, some will want to maintain their winning bids. The Commission should allow any bidder to “opt-in” and voluntarily retain its application and winning bid obligation. This would further the Commission’s various public interest goals by ensuring that only those licensees who still placed a high value on the spectrum would receive it, while those who need the money more than the spectrum would be freed from their contingent liabilities. Likewise, and for the same reason, the Commission should allow winning bidders to pick and choose among their winning bids, and retain the right (and obligation) to acquire only those that they still value highly.

Nor should bidders be penalized in any way for choosing to opt-in, or choosing not to opt-in. The Commission should not perversely incentivize applicants to obtain licenses that they no longer value highly by penalizing bidders who give up their right to acquire those licenses. Nor would it be sound public policy to impose penalties on an industry already so beset by financial difficulty. The Commission should therefore waive its default rules to the extent necessary,⁵ and should also allow Auction 35 winners to bid in any re-auction without regard to whether they had previously submitted the high bid for a given license.

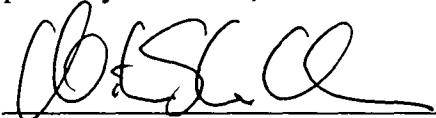
Finally, Leap would note that time is of the essence in this matter. The Commission should act swiftly in the instant proceeding to provide carriers the opportunity to withdraw their application. And once a bidder withdraws its application the Commission should refund the remainder of its deposit within ten business days.

⁵ Leap agrees that the present situation is more appropriately characterized as a “mutual rescission of obligations” made by the parties to the auction (*i.e.*, the FCC and the bidders) than a default or debt forgiveness scenario. *See* Comments of DCC PCS, Inc. (October 11, 2002).

V. CONCLUSION

A \$16 billion contingent liability is now dragging down the troubled wireless industry, like an anchor tied to the transom of a boat in stormy seas. The Commission should release the industry from this liability, and allow it to put this capital reserve to more productive use. The Commission should release Auction 35 bidders from the obligation to pay for licenses that they no longer value.

Respectfully submitted,

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